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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1114

GULF REFINING COMPANY,

Petitioner,

vs.

MARK C. WALKER & SON COMPANY, ET AL.

No. 1115

GULF REFINING COMPANY,

Petitioner,

vs.

CHARLES WEAVER & COMPANY, INC.

BRIEF ON BEHALF OF RESPONDENTS MARK C. WALKER & SON COMPANY AND CHARLES WEAVER & COMPANY, IN REPLY TO PETITION AND BRIEF FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

WM. M. HALL,
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Petitioner and Appellant Below,

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Respondents and Appellees Below.

No. 1115

GULF REFINING COMPANY,
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Respondent and Appellant Below.

BRIEF ON BEHALF OF RESPONDENTS MARK C. WALKER & SON COMPANY AND CHARLES WEAVER & COMPANY, IN REPLY TO PETITION AND BRIEF FOR WRITS OF CERTIORARI.

Statement of Case.

Petitioner seeks certiorari for review here of the judgment of the Circuit Court of Appeals affirming the judgment of the District Court dismissing upon motion heard

at a pre-trial hearing petitioner's action against Shelby County, Tennessee, affirming the judgment of the District Court dismissing petitioner's action against Mark C. Walker & Son Company upon verdict directed against Mark C. Walker & Son Company upon its motion, and reversing with dismissal of action the District Court's judgment against Charles Weaver & Company.

Petitioner's action against Shelby County was upon the theory that Shelby County contracted with it not to break its pipe lines in doing or having done the flood protection work under the right and privilege which it gave the County for that purpose on a certain strip of its land and on certain of its land adjoining that strip and breached the same in that its pipe lines were broken and it suffered damages as the result; and upon the alternative theory that Mark C. Walker & Son Company who did the work, was its agent and did the work negligently and the County should respond. The County and Mark C. Walker & Son Company were sued jointly upon the alternative theory. The District Court held in effect that there was no such contract between the County and petitioner and dismissed as to the County. Petitioner thereafter amended its complaint charging in effect that Walker & Son Company had no privilege to go upon its land adjoining the right of way strip and there do the work which caused the breaking of the pipe lines. This was to forestall the anticipated defense of Walker & Son Company that the work was done by its sub-contractors, Weaver & Company, who was an independent contractor and alone liable for negligence, if any. The District Court held under that theory that Walker & Son Company did have the privilege to do said work and the right to contract with Weaver & Company to do it and had not directed a trespass in so doing and that its sub-contractor, Weaver & Company was an independent contractor

and Walker & Son Company was not liable for its negligence. Petitioner's action against Weaver & Company was independent of its action against the County and Walker & Son Company and was brought in the State Court and was upon the ground that it ran its heavy machinery used in doing the work upon the pipe lines which was negligence and the cause of their break-down and its loss. This suit was removed from the State Court to the District Court and there consolidated with petitioner's suit against the County and Walker & Son Company. The District Court overruled a motion for a directed verdict made by Weaver & Company at the conclusion of all the proof and submitted the case to the jury who returned a verdict against Weaver & Company upon which the judgment against Weaver & Company was entered.

Petitioner's complaint against the action of the Circuit Court of Appeals is put generally upon the ground that it is contrary to the settled law of Tennessee. See petition, page 4.

Petitioner's complaint against dismissal of its action against Weaver & Company, incidental to the reversal, is that that is beyond the power of the Circuit Court of Appeals under the Seventh Amendment to the Constitution of the United States. See petition, page 4.

Walker & Son Company and Weaver & Company are not concerned with and are leaving the County to answer petitioner's complaint as to the action in its favor.

Walker & Son Company are concerned only with petitioner's complaint against the action of the Circuit Court of Appeals in its favor and answering petitioner's general charge, generally, says that the action of the Circuit Court of Appeals was not contrary to the settled law of Tennessee.

Weaver & Company are concerned only with petitioner's complaint against the action of the Circuit Court of Ap-

peals in reversing the judgment of the District Court against it and answering petitioner's general charge, generally, says that that action was not contrary to the law of Tennessee. It is also concerned with the dismissal of the action against it contemplated by the reversal and says generally that the Circuit Court of Appeals is not without power to dismiss or direct dismissal of the action against it under the Seventh Amendment to the Constitution.

Respondents reverse the order pursued by petitioner and present their answers to petitioner's complaints in their chronological and more logical order.

Points and Authorities Relied On.

I.

The holding of the Circuit Court of Appeals that Walker & Son Company was not liable for the negligence of Weaver & Company and that the District Court correctly directed a verdict in its favor, was not contrary to the law of Tennessee.

Petitioner's superintendent, who was its principal witness, admitted that the rights and privileges given the County were for the benefit of the United States, who was to do the work by contract, under the Federal Flood Control Act, 33 U. S. C. A., Paragraph 701 for the protection of the City of Memphis and the County of Shelby in which it was located, incidently, the protection of petitioner's property therein (R. 125-127, 136). Walker & Son Company got its right and privilege to enter upon petitioner's property and do the work and pass the same to its sub-contractor, Weaver & Company, through the contract of the United States with itself (R. 22-27, 200). Walker & Son Company was, therefore, not a trespasser and did not direct a trespass in making a sub-contract with Weaver & Company to do the work pursuant to which Weaver & Company

acted, which would have deprived it of immunity under the independent contractor doctrine, and made it responsible for Weaver & Company's break-down of the pipe lines whether the result of negligence or not.

The evidence showed without conflict that Walker & Son Company sub-let by written contract to Weaver & Company and did not reserve therein control of Weaver & Company in the doing of the work and did not control, direct or attempt to control or direct Weaver & Company in its doing of the work thereunder (R. 22, 234, 248, 254-256, 266). Weaver & Company was, therefore, an independent contractor, solely liable for its acts of negligence.

Knoxville Iron Co. v. *Dobson*, 75 Tenn. 367;
Powell v. *Construction Co.*, 88 Tenn. 692;
Salliotte v. *Bridge Co.* (C. C. A. 6), 122 F. 378, 65 L. R. A. 620.

Railway Company v. *Beatty*, 5 Tenn. Civ. App. 186, cited by petitioner on Page 36 of its petition is not contra. The Tennessee Court of Civil Appeals and the Supreme Court of Tennessee by denying certiorari, held therein that one who contracted in consideration of a privilege to enter upon land and do work, not to damage certain things thereon, could not claim immunity under the doctrine of independent contractor, from doing of the thing contracted against, by a contractor or the contractor's sub-contractor. Walker & Son Company was under no such contract with petitioner and there was no privity between petitioner and itself under the County's contract with petitioner, if it went that far. The trial court dismissed Beatty's action against contractor and the sub-contractor in *Railway Company* v. *Beatty*, doubtless because there was no privity between them and Beatty, and the appellate court's affirmance of the judgment of the trial court indicated the correctness of that action.

II.

The holding of the Circuit Court of Appeals that the evidence was insufficient to warrant or support a verdict against Weaver & Company and that the District Court erred in denying Weaver & Company's motion for a directed verdict and submitting the case to the jury, was not contrary to the law of Tennessee.

Petitioner charged in substance and effect that Weaver & Company ran its heavy machinery which it used in and about its work, upon its pipe lines which constituted negligence in the doing of the work and that the pipe lines were broken thereby and it suffered damages (R. 57-61). The pipe lines in question were four in number and crossed a ditch which was west of the levee which was to be constructed for flood protection and was between the levee and the Mississippi River, and ran from north to south practically parallel with the levee and the Government's engineer decided after the County had gotten the right of way grant from petitioner, that it should be filled for the protection of the levee and the County secured petitioner's permission to do so. The Government's plan for the work included the ditch fill. The grade provided for the ditch fill contemplated the covering of the pipe lines to a depth of from 3 to 3½ feet. There was a concrete structure expanding the ditch on which the pipe lines rested. This structure consisted of three concrete beams containing an uncertain amount of reenforced steel 14 inches thick and 18 inches wide laid across the ditch about 4 feet apart. There was a cross beam of the same dimensions between the middle beam and the southern-most beam, with its ends set into the sides of those beams, and connecting them. This cross beam was at about the middle of the beams and the middle of the ditch. There was no pier under it and its bearing strength depended upon the attachment of its ends to those beams. There was no connection between

the northern-most beam and the middle beam. The ditch where this structure crossed was about 25 feet wide and 17 feet deep. The pipe lines were of 6 inch iron pipe and were laid on the cross beam between the middle and southern-most beams. Each of the lines contained a joint called a cast iron flange joint over the ditch space about half way between the cross beam and the west bank of the ditch without any support under them. These joints were made of an iron ring on the end of each pipe to be coupled and when the two were brought together were fastened by bolts in that part of the ring projecting beyond the pipe. Joints of that kind were used because of the ease with which they could be opened when it was desirable to uncouple the pipe. A wooden bridge for light traffic was laid across the ditch on the northern-most beam and the middle beam. This bridge was of plank laid from the top of the middle beam to the top of the northern-most beam. This bridge was to be removed when the ditch was filled (R. 96, 102-104, 140-150, 185).

Weaver & Company's contract was to fill the ditch in accordance with the Government's plan and as its engineer directed, the specified grade of the fill, as stated, carrying it from 3 to 3½ feet over the top of the pipe lines. Petitioner, presumably, was acquainted with the Government's plan and had acquiesced in it without reservations (R. 233, 211, 215).

Petitioner had no witness who testified to seeing the machine with which the ditch was filled and the pipes were covered, run upon the pipes nor was there proof of any tracks or sinks upon the fill which would indicate that a machine had run upon the pipes. Petitioner's superintendent, Lynch, who was his principal witness, testified that he was present during most of the time that the work of filling the ditch was being done and that the machine did not go upon or strike the pipes during that time, that he was not pres-

ent, however, when the dirt was placed over the pipe lines, as the fill of the ditch representing that part of the work was not reached and done until nightfall and he had to leave the work at that time and did not return until next morning, but that he did not see any tracks or sign of sinking on the fill (R. 98-104, 130). Petitioner's principal proof upon the issue was that after using one of the pipe lines and finding that a large amount of gasoline pumped through it from a barge on the river had not reached the storage tank it made an excavation over the pipe line structure and found that the lines were broken at their cast iron flange joints and that the gasoline had been lost through the break in the line that had been used.

Petitioner, with the idea evidently that it would indicate the probability that the breaks in the joints were due to the machine having been run upon them, showed by its superintendent of construction out of the New Orleans office that the pipe lines and supporting structure was in good shape when he examined it some months before (R. 176-188). Petitioner, with the same idea, asked Captain Meyer, one of the Government's engineers if the pipes and beams did not appear to be good construction work. The Captain answered that he had not examined it with that in view and could not answer without knowledge as to the exact dimensions, span, type of interior reenforcement, exterior concrete and other details entering into the problem. Pressed further, he was asked if the weight of the dirt imposed upon the pipes could cause damage to the pipes and supporting beams and he answered that assuming the pipes and beams were in sound condition in his opinion the load of dirt above the pipe would not of itself cause damage but upon cross-examination he stated that this was based upon a general view of the pipe line and beams and he would not venture judgment as an engineer as to the substantialness of the structure and pipe joints without getting down into the ditch

and examining them and getting a knowledge of all attendant circumstances and conditions and that he had not done that; and when asked about the pipe joints the breaking of which was the vital question, he stated that he was not an expert in pipe line construction, meaning that he could express no opinion (R. 216-220). Captain Myers' testimony, therefore, was not substantial evidence with respect to petitioner's theory of the probable cause of the break. Petitioner's proof had to go further and show the bearing strength of those pipe lines in their unsupported cast iron flange joints, and the weight of the 3 or 3½ feet of dirt that was laid upon them under the agreed plan, to give any support to its theory of probability, if that was sufficient and it made no such proof, from which it is to be inferred that it would be against petitioner's theory.

Weaver & Company called all of its agents who had taken part in the filling of the ditch and the covering of the pipe lines and proved by them that the machinery with which the work was done was not run upon the pipe lines nor against the pipe lines; that a Government inspector was upon the ground watching the work while the pipe lines were being covered. It further showed that the Government accepted the work without reservation or exception and that this was after it was known that the pipe lines were broken. Weaver & Company showed by an expert who was also acquainted with these lines, that unsupported cast iron flange joints would break down under a weight of two thousand pounds and by an engineer familiar with the character of dirt with which the fill was made that the dirt placed over those pipes weighed more than that. Weaver & Company also showed that it was usual and customary to do such work with the type of machine used by Weaver & Company for this work.

Petitioner did not make any proof in rebuttal as it could have done if Weaver & Company's proof was not true.

Under the Tennessee authorities such proof in such a case had to be rebutted and rebuttal proof absent, it was error to overrule a motion for directed verdict and submit the case to the jury and a judgment upon a verdict in favor of the plaintiff should be reversed and the verdict set aside and the action be dismissed.

Standard Oil Co. v. *Roach,* 19 Tenn. App. 661, 94 S. W. (2d) 63.

The Supreme Court of Tennessee denied certiorari thereby making the opinion in that case its own.

Beard v. *Beard,* 158 Tenn. 437, 14 S. W. (2d) 745.

See also—

DeGlopper v. *R. R. & Light Co.,* 123 Tenn. 633;

No. Memphis Savings Bnk. v. *Union Bridge & Construction Co.,* 128 Tenn. 166.

The Tennessee cases cited in petitioner's brief on pages 58, 59 and 60 are not only not contrary but not in point with this case.

III.

There does not appear to be any conflict in the decisions of the Circuit Courts of Appeal as to that Court's power under Rule 50 (b) of Rules of Civil Procedure, to direct dismissal of an action, consistently with the Seventh Amendment to the Constitution, upon reversal of the judgment of a District Court in favor of a plaintiff because of the insufficiency of the evidence to support a verdict where defendant had moved for a directed verdict upon that ground and the Court had denied the motion and submitted the case to the jury and the jury had returned a verdict for the plaintiff upon which the judgment had been rendered.

There was a direction to dismiss upon reversal under such conditions, in the following cases:

Eastern Live Stock Co-operative Ass'n v. *Dickenson,* (C. C. A. 4, 1939) 107 F. (2d) 116;

U. S. v. *Halliday,* (C. C. A. 4, 1941) 116 F. (2d) 812;
Conway v. *O'Brien,* (C. C. A. 2, 1940) 111 F. (2d) 611;
Brennan v. *Baltimore & O. R. Co.,* (C. C. A. 2, 1940) 115 F. (2d) 555.

No case has been found in which a Circuit Court held that a dismissal was not within its power under Rule 50 (b) under such conditions.

In the following cases there was a direction to grant or pass upon the motion for a new trial but those cases involved conditions that were different and called for new trials instead of dismissals:

Duncan v. *Montgomery Ward Co.,* (C. C. A. 8, 1940) 108 F. (2d) 848;

In the Supreme Court—

Montgomery Ward Co. v. *Duncan,* 311 U. S. 243, 85 L. Ed. 147;
Pruitt v. *Hardware Dealers Mutual Fire Ins. Co.,* (C. C. A. 5, 1940) 112 F. (2d) 140.

In the following case in which dismissal was directed upon reversal, motion for a directed verdict had been denied and submission was without express reservation but after verdict there had been motion for judgment notwithstanding:

Brunet v. *Kresge Co.,* (C. C. A. 7, 1940) 115 F. (2d) 713.

In the following cases motion had been denied and submission was with express reservation and after verdict motion had been made for judgment notwithstanding:

Limbershaft Sales Corp. v. *Spalding,* (C. C. A. 2, 1940) 111 F. (2d) 675;
Pessagno v. *Euclid Inv. Co.,* (C. C. A., Dist. C., 1940) 112 F. (2d) 577.

See Editor's note, 85 L. Ed. of U. S. Supreme Court Reports, Pages 151-311, for review of above cases and others.

The Supreme Court granted certiorari in the following cases because of the question but did not decide it because the Court found that the Circuit Courts were in error in holding that the evidence was insufficient to support a verdict:

Conway v. *O'Brien*, 312 U. S. 492, 85 L. Ed. 969;
Berry v. *U. S.*, 312 U. S. 450, 85 L. Ed. 945;
Halliday v. *U. S.*, decided January 19, 1942, — U. S. —, 86 L. Ed. 393, Adv. Sheets No. 6.

The Supreme Court denied certiorari in *Brennan* v. *Baltimore & O. R. Co.* (C. C. A. 2, 1940) 115 F. (2d) 555, 312 U. S. 685, 85 L. Ed. 1123; *Brunet* v. *Kresge Co.* (C. C. A. 7, 1940) 115 F. (2d) 713, 313 U. S. 577, 85 L. Ed. 1535.

IV.

Rule 50 (b) does not violate the Seventh Amendment and warranted the Court's dismissal in this case and direction to grant a new trial instead would have been erroneous.

In *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654, 79 L. Ed. 1636, decided before the promulgation of the Rules of Civil Procedure, it was held that where a defendant moved for a directed verdict and the District Court denied its motion and submitted the case to a jury with a reservation of decision upon the motion and the jury returned a verdict for the plaintiff and judgment was entered thereon, the Circuit Court of Appeals could, upon finding that the motion should have been sustained and that the judgment was to be reversed, direct dismissal of the action without violating the Seventh Amendment, submission with reservation being in accordance with the common law practice and a question of law being left for decision. The

Circuit Court had directed, however, that a new trial be granted and the Supreme Court modified its judgment by directing dismissal in place of its direction for a new trail.

Rule 50 (b) with its provision for automatic reservation was considered by the Advisory Committee and the American Bar Association as the equivalent of the reservation approved in the Redman case as within the common law practice.

U. S. v. *Halliday* (C. C. A. 4), 116 F. (2d) 812;
3 Moore's F. Practice under New Federal Rules, 3108-3111, and 1941 Pocket Supplement, P. 61-64.

The Courts of Appeal have decided the cases cited above upon that idea.

A motion after verdict for judgment notwithstanding has not been deemed necessary to preserve the question of law made by the denial of the motion for a directed verdict.

See cases first cited under Point III.

In *U. S.* v. *Halliday, supra,* it was expressly held that while a motion after verdict for judgment notwithstanding would have been the better part of wisdom, it was not essential.

In *Baltimore & Carolina Line* v. *Redman, supra,* it did not appear that there had been any motion after verdict for a judgment notwithstanding.

A motion for a judgment n.o.v. is no more necessary to preserve the question of law made by the denial of a motion for a directed verdict, than a petition to rehear is necessary to the preservation of the question as to the incorrectness of a Court's judgment under the law.

The Supreme Court's denial of certiorari in *Brennan* v. *Baltimore & O. R. Co.,* 115 F. (2d) 255, 312 U. S. 685, 85 L. Ed. 1123, makes that case direct authority, it is respectfully submitted.

Conclusion.

Respondents respectfully submit that the petition for certiorari should be denied.

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